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No. 968

In the Supreme Court of the United States

October Term, 1961

Rodney E. Wallack, petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 933

BRAXTON C. WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1962 (Pet. App. 14a), and a petition for rehearing was denied on April 16, 1962 (Pet. App. 15a). The petition for a writ of certiorari was filed on May 4, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, an accountant who prepared returns for a taxpayer and who was indicted with the

taxpayer for attempting to evade taxes by the filing of false returns for the taxpayer, was deprived of a fair trial because the jury was not informed that the taxpayer had entered a plea of *nolo contendere* to the charge.

2. Whether there was sufficient evidence to sustain a finding that the defendant wilfully and knowingly attempted to evade or defeat an income tax owed by his client.

3. Whether the court's instructions prevented the defendant from receiving a fair trial.

STATUTE INVOLVED

Section 145 of the Internal Revenue Code of 1939 provides in pertinent part as follows:

* * * * * * *

> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

STATEMENT

On October 28, 1957, a four-count indictment (App. 420–424) [1], was returned against petitioner, who is a lawyer and certified public accountant, and against his client, Maurice Puckett. The first count charged a conspiracy to prepare false and fraudulent income tax returns. The second, third, and fourth counts charged that petitioner and Puckett wilfully attempted to evade and defeat the income taxes of Puckett for the years 1951, 1952 and 1953, in violation of Section 145(b) of the Internal Revenue Code of 1939. The reported and correct taxable income and tax liability of Puckett, as alleged in counts 2, 3, and 4 of the indictment, are as follows:

		Reported		*Correct*	
Count	*Year*	*Income*	*Tax*	*Income*	*Tax*
Second	1951	$24,770.50	$6,784.50	$43,260.36	$15,986.40
Third	1952	17,275.19	4,417.56	35,607.19	12,980.12
Fourth	1953	39,799.93	15,405.94	54,695.57	24,994.02

Puckett entered a plea of *nolo contendere* and was sentenced to pay a fine (Pet. 5). Petitioner entered a plea of not guilty, was tried by jury in April 1959 and was convicted on all four counts of the indictment. He appealed, and the Court of Appeals for the Fourth Circuit reversed and remanded the case for a new trial, holding, in a lengthy opinion (281 F. 2d

[1] The appendix (483 pages) filed by petitioner in the court of appeals is herein referred to as "App."; the appendix attached to the petition for certiorari is referred to as "Pet. App."; the appendix filed by the government in the court of appeals is referred to as "G. App."

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CITATION

Statute:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b)) 2, 6

656) that there was sufficient evidence to warrant conviction, but that trial errors required reversal.

In April, 1961, petitioner was again tried by jury on the same indictment, and the jury returned a verdict of not guilty with respect to count 1 (the conspiracy count), but of guilty with respect to the remaining three counts (App. 405). The court sentenced petitioner to pay a fine of $10,000, and to imprisonment for two years (App. 415–416).

There was overwhelming evidence that Puckett, petitioner's client, had large amounts of income during 1951, 1952, and 1953 which were omitted from the tax returns. Puckett owned and operated several hotels, including Savannah Hotel Operating Company, which he purchased in 1949 (App. 239). From 1941 through 1958, Puckett employed petitioner to prepare tax returns and to look after his accounting work (App. 4). When an Internal Revenue Agent examined the hotel books, he found that in each year, and in every month of each year, the hotel paid bills for clothing, jewelry, etc., for Puckett and his wife, to the extent of $5,140.18 in 1951, $3,358.40 in 1952, and $1,588.04 in 1953. (G. App. 6, 13–21.) For example, dresses, "earbobs" and a necklace were charged on the hotel's books to "Inventory, Uniforms" (G. App. 16). For almost every month, these items appeared at the beginning of the voucher registers (G. App. 19–20). The hotel bookkeeper called to petitioner's attention the fact that these personal expenses were being improperly charged to the hotel, yet petitioner gave him no instructions to correct the situation (App. 28, 29). That conversation oc-

curred between October 1952, and February 1953 (App. 28–29), and thus before the filing of tax returns for 1952 and 1953.

When Puckett decided to install air conditioners in the hotel, petitioner advised him to buy them in his own name, and then to recover the cost in installments from the hotel (App. 181–191). Puckett spent about $14,000 on air conditioners (App. 191) and thereafter received from the hotel, about once a month, payments for the air-conditioners first at the rate of $20 per day, then $50 per day, then $70 per day (App. 148), until he recovered the original cost and $7,020.27 in addition (G. App. 6). Yet petitioner included none of these payments when he prepared Puckett's tax returns (App. 189).

Puckett also received income from the hotel, by payments made by it to Carga Corporation, a corporation having no books or records and wholly owned by Puckett, with his wife or daughter perhaps owning a "qualifying share" (G. App. 22–25). Six thousand dollars per year went from the hotel to this corporation and thence into Puckett's personal bank account (G. App. 23–24). Petitioner initiated this procedure (G. App. 22–25) and reported $1,200 of this income on Puckett's return, $1,200 on Puckett's wife's return, and $1,200 on Puckett's daughter's return; the balance of $2,400 did not appear on any returns. A "package" liquor store was operated in the hotel, and Puckett received $3,060.64 from this source during 1951 and 1952, but none of this income was reported on Puckett's returns (G. App. 26–32).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that the jury should have been informed that Puckett had pleaded *nolo contendere* and had been fined, and should have been instructed that there must be a guilty taxpayer in order to convict petitioner.

There is no merit to the contention that Puckett's guilt was suppressed, for Puckett was put on the stand by the government, and petitioner's trial attorneys were free to make the cross-examination which present counsel now evidently wishes had been made. It seems obvious that trial counsel did not inject the fact of Puckett's plea or sentence because of the likely adverse effect upon petitioner. Indeed, if the government had attempted to introduce such evidence the defense would no doubt have objected. It might also be noted that Puckett was not "paraded" as innocent. The evidence of his diverse, continuing, and gross fraud on the revenue was complete and damning.

Nor is there merit to the contention that Section 145(b) (*supra*, p. 2) requires a "guilty taxpayer" before anyone else can be convicted of the offense therein specified. No case we have been able to find so holds. Certainly no case cited by petitioner (Pet. 7-13) stands for this proposition. Section 145(b) punishes "*any* person who willfully attempts in any manner to evade or defeat *any* tax imposed by this chapter or the payment thereof" (emphasis supplied). The plain language of the statute obviously applies to an accountant, such as petitioner, who wilfully does some affirmative act designed to defeat the taxes owed by another.

2. Petitioner asserts (Pet. 14) that the evidence as to knowledge or wilfulness was "vague, indefinite, illusory and unconvincing." However, petitioner was tried twice, and each time the jury found him guilty.[1] The court of appeals has twice reviewed the evidence, and each time has concluded (Pet. App. 8a-10a) that it "was such that a jury might find the defendant guilty beyond a reasonable doubt" (Pet. App. 10a). In reaching that conclusion, the court of appeals was addressing itself specifically to the sufficiency of the "evidence of defendant's *knowledge* of Puckett's evasion of federal income taxes" (Pet. App. 9a; emphasis supplied). It is evident that the court below was applying the test of actual knowledge, and not any lesser test permitting conviction on the basis of what petitioner should have known but may not have known. The circumstances specifically alluded to by the court of appeals (Pet. App. 9a) were of course only a part of a very long and complex story, from which reasonable men could conclude beyond any doubt that petitioner not only had full knowledge of a persistent pattern of tax evasion, but also actively advised in that course and, year after year, omitted income which he then and there knew should be included in the tax returns he prepared.

3. Finally, petitioner complains (Pet. 14-17) about the instructions given to the jury and suggests that the jury was permitted to convict on the basis of what the petitioner should have known. The suggestion is

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[1] Except, as previously noted, that he was acquitted as to the conspiracy count at the second trial.

not correct. The instructions included the following (App. 336, 338–339):

> The word "attempt" as used in this statute involves two things: an intent to evade or defeat a tax and some act done in furtherance of such intent. The word "attempt" contemplates that the defendant Wallace had knowledge and understanding that during 1951, 1952 and 1953, the defendant Puckett had an income in such years which was taxable, and which he was required by law to report, and he attempted to evade or defeat the tax thereon or a portion thereof by purposely failing to report all the income which he knew the defendant Puckett had during such calendar years and which he knew it was his duty to report in Puckett's returns for those years.
>
> * * * * *
>
> The attempt to evade and defeat the tax must be a wilful attempt. That is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which it is the duty of the defendant Puckett to pay to the Government. The attempt must be willful, and intentionally done with the intent that the Government should be defrauded of the income tax due.
>
> * * * * *
>
> You are instructed, however, that the mere failure of the defendant Wallace to detect or discover an erroneous or improper entry or entries in any book or record of the defendant Puckett or of any other person, firm or corporation for which he may have prepared income tax returns, is not sufficient to impute to the defendant Wallace an intent to evade or de-

> feat the tax of the defendant Puckett unless there was criminal intent rather than negligence. In other words, if the defendant Wallace in good faith disclosed on the income tax returns in question which he prepared for the defendant Puckett the income that he honestly believed that the defendant Puckett had received for each of the years in question, then this would disprove intent on his part to aid and assist the defendant Puckett in evading the payment of his tax, because a person is not held responsible or accountable for mistakes or errors honestly made. The error must be accompanied by knowledge that the truth is not being told. If the defendant Wallace honestly believed that Puckett was supplying him with accurate information in regard to his income, and he had no knowledge of additional income received by Puckett for the years in question, he would not be guilty.

It is submitted that the foregoing charge clearly and correctly informed the jury of the elements necessary for conviction, including knowledge of unreported income and intent to defraud the government. The isolated expressions selected by petitioner to show that the charge was in terms of "constructive knowledge" occurred in the course of the court's effort to review the evidence and conflicting contentions in the case. Petitioner's counsel took no exception and requested no clarifying instructions (App. 381–382). The court's instructions or remarks must be read as a whole, and, so read, they clearly and correctly instructed the jury. It should be noted, also, that the arguments of counsel on both sides focused on the question of actual knowledge and actual intent (App. 273–278, 279–280).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1962.